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Issue Date: 04 January 2005

CASE NO.: 2003-LHC-2240

OWCP NO.: 07-148904

IN THE MATTER OF

GLORIA EDWARDS,
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.,
Employer

APPEARANCES:

John D. Gibbons, Esq.
On behalf of Claimant

Paul B. Howell, Esq.
On behalf of Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Gloria I. Edwards (Claimant) against Northrop Grumman Ship Systems (Employer). The formal hearing was conducted in Mobile, Alabama on October 21, 2004. Each party was represented by counsel, and each presented documentary evidence, examined and

cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-4 and Employer's Exhibits 1-18. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on June 2, 1998;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on June 2, 1998;
5. A Notice of Controversion was filed June 11, 1998;
6. Informal conferences were held on September 4, 2002 and May 29, 2003;
7. The average weekly wage at the time of injury was $615.49;
8. Temporary total disability benefits were paid from June 10, 1998 through August 3, 1998, from July 10, 2000 through July 19, 2000, from October 19, 2000 through November 2, 2000, from March 22, 2001 through March 28, 2001, from January 8, 2002 through January 28, 2003, and from February 5, 2003 through January 7, 2004;
9. Permanent partial disability was paid for a 13 percent impairment to the right foot in the amount of $10,935.29;
10. Medical benefits have been paid;
11. Permanent disability is stipulated to and there is a 13% impairment to Claimant's right foot; and
12. Date of maximum medical improvement is disputed.

Issues

The unresolved issues in this proceeding are:

[1] The record was closed at the conclusion of the hearing.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

1. Date of maximum medical improvement;
2. Nature and extent of disability[3]; and
3. Attorney fees.

Statement of the Evidence
Testimonial Evidence

Gloria I. Edwards

Claimant testified that she is 57 years old and lives in Mobile, Alabama. She graduated from high school in Alabama, completed one year of college in Texas, and went to college at Jackson State in Mississippi for electrical training. Claimant said that her husband is in the military, and as a result, they have lived many places, including Texas, Germany, and Virginia. Prior to working for Employer, Claimant worked as a sales manager at a men's clothing store, but has not worked in retail since that time.

Claimant began working for Employer on August 21, 1977.[4] She was initially employed as a cable puller in the electrical department, and a year later she began what she described as an "apprentice" program wherein Employer sent her to school. As a result, Claimant worked as a first-class electrician in the electrical department for twenty six years, until 1997, when Claimant worked in Employer's shopfitting department for one year. Claimant was injured in 1998 and said that after her injury she returned to the electrical department.

Claimant described her injury as occurring when she was working in the panel shop. She said it was her first time performing that type of work, but she learned how to do it. She explained that she was "spinning the angle," which is a flat, solid surface run by a hydraulic machine. When she fitted the angle, she hit it with an eight-pound hammer which caused the angle to come up from under a ram that was being operated by another worker while Claimant was fitting the deck to tack it. Claimant was in a straddle position over the ram, and when she hit the ram, the angle came over on her foot and the ram came down on the angle and crushed her foot. She stated that she was told that 615 pounds of pressure hit her foot in the accident.

[3] Actually, Claimant acknowledged payment of all compensation due with the exception of the periods of January 29, 2003 to February 5, 2003 and January 7, 2004 to March 19, 2004 (Tr. pp. 83-86 and 90).

[4] When Claimant was initially hired, she worked for Employer's predecessor, Ingalls Shipbuilding.

Claimant testified that she believed at the time that her foot was severed. She could not pull her foot out from under the ram because it was operated by hydraulics, so she had to wait until the ram could be lifted to a point where she could disengage herself.

After the accident, Claimant was initially seen by Dr. Volkman and then by his associate at the Orthopaedic Group, Dr. Freeman, who had previously treated Claimant. Claimant stated that following the accident, Dr. Freeman originally engaged in conservative treatment consisting of prescribing Celebrex, but the arthritis on Claimant's toe was "really built up," and because the medicine would not reduce the buildup, Dr. Freeman had to remove the buildup. Claimant said after this surgery on January 24, 2002, she returned to work, but the more she wore steel toed boots, the worse the arthritis got.

Claimant underwent a total of three surgeries performed by Dr. Freeman, all due to the fact that the first fusion would not heal. The surgeries were performed on January 24, 2002, May 1, 2002, and November 6, 2002. Claimant said that Dr. Freeman then referred her to Dr. Parks because he was more skilled at surgery. Dr. Parks assumed Claimant's care in February 2003. Dr. Park performed another surgery on August 7, 2003.

Claimant stated that she was aware that she was released to return to light duty employment by Dr. Freeman on January 29, 2003, but she said that Employer only allowed one year of light duty which she had already used from 1997-1998 in shipfitting, so when she returned to work on January 29, she maintains Employer told her if she could not return to regular duty, then she could not return to work. She said she then returned to Dr. Freeman who gave her a work restriction of no steel- toed boots, and when she returned to Employer, they refused her work because Employer requires steel-toed boots to be worn.[5]

Subsequently, Claimant was off work for almost a year, and remained under the care of Dr. Park who next released her to work on December 29, 2003, again with a restriction against wearing steel-toed boots; rather, he wanted her to wear a steel-shank shoe, where the steel runs along the bottom of the shoe and there is no steel on the toe, therefore no pressure would be put on Claimant's toe.

[5] Claimant testified for the past ten years OSHA had required the wearing of steel-toed boots at the shipyard.

Following Dr. Park's release, Claimant testified that she returned to work in December, but was again refused because of the restriction against steel-toed boots. Claimant was released to work again by Dr. Park on April 20, 2004, with no restrictions regarding the steel-toed boots. Claimant stated that she told Dr. Park that she disagreed with his opinion. She said she had tried several times to wear the steel-toed boots in her house to see if she could handle them, but said that her feet swell if she stands for too long, and she is not capable of working eight hours per day or four hours at a time if she is walking.

Claimant currently wears a specially designed steel-shank shoe which she states eliminates most of the problems with her foot. Claimant testified that even if she did not have to wear the steel-toed boots and was allowed to wear her special shoe, she did not think she would be able to work eight hours per day, especially if it was cold. She explained that cold temperatures make her foot hurt and swell. When she is at home, Claimant said she wears socks and house shoes because she has to keep her foot warm. She stated that she was unsure whether she would be able to work somewhere if given the opportunity to stand or sit.

Claimant testified that she currently takes Celebrex, and she takes Lortab for pain only if she needs it. She said that her treatment has been transferred back to Dr. Freeman and she last saw him on October 11, 2004 when he prescribed something for pain. Claimant stated that she has been out of work for over two and a half years, and during this time her income source has been Social Security disability benefits and retirement benefits from Employer. Claimant said she did not have a choice but to retire from Employer because she could not "go back to that job and put [her]self through that." She stated that she also has a TENS unit, which she never uses because Dr. Park wanted her to use it ten hours per day.

Claimant said that she never met with Tommy Sanders, Employer's vocational rehabilitation specialist, but he did provide her with a list of places at which she could look for work. Claimant testified that she looked for work in the retail field, and applied at three locations since January of 2004. She stated that if she had not been injured, she would still be working for Employer.

On cross-examination, Claimant testified that she did not use the TENS unit because Dr. Park said it was to bind the bones together and they were already bound. She also explained she does not use the TENS unit because the pain she suffers is in the steel in her foot, not in the bone. She acknowledged that there was a note from Dr. Freeman (who treated her for a hand injury prior to the accident) dated February 20, 1997 that mentioned Claimant was having problems with the

same toe that was injured in the accident. She explained that Employer had just begun requiring workers to wear steel-toed boots, and they bothered her foot and her knee at that time.

Claimant reiterated that she does not feel that she can wear steel-toed boots despite having been released to work by Dr. Park without this restriction. Claimant acknowledged that she had difficulty wearing steel-toed boots before the injury, but stated that the injury has affected her in that she now has a steel plate and screws in her foot.

Claimant testified that Dr. Volkman was Employer's choice of physician and not hers, despite her signature appearing next to Dr. Volkman as her choice of physician. She stated that she expressed her desire to see Dr. Freeman and was told that Dr. Volkman was in the same group, and since Dr. Freeman did not work on hands and feet, she ended up with Dr. Volkman. She said she was angry with Dr. Volkman because he returned her to work the day after she had the accident, and she felt that he served Employer's interest, not hers. Claimant agreed that she also became upset with Dr. Freeman when he released her to work, because she claimed that he knew she could not wear the required steel-toed boots. She admitted that she also became upset with Dr. Park when he wanted her to wear steel-toed boots.

Claimant acknowledged that Dr. Park determined she had reached MMI on December 29, 2003, but stated he did not tell her about the 13 percent disability which she learned about from her attorney. Claimant said she attempted to return to work for Employer on December 29, 2003 but Employer would not take her because of her light duty and no steel-toed boot restrictions.

Claimant testified that she attempted to locate other employment around December 29, 2003, when she learned Employer would not take her. She said she applied at GQ, a men's clothing store, but did not fill out an application because she knew the man hiring and he did not so require. She reported GQ was not hiring at the time. She applied at J.C. Penney, where she did complete an application, but the store was not hiring. She said she told J.C. Penney that she had experience in sales and alteration, but did not inform them of her work restrictions or her physical problems. She inquired at the Limited retail shop for a sales clerk position, but the store was not hiring at the time. Claimant stated that she has not applied for any employment since that time because she was attempting to open a restaurant with a friend, but the business did not materialize. Claimant said she did not apply for any of the positions identified by Employer's labor market survey.

Claimant testified that she went to Employer every time one of her physicians returned her to work. The last time she went to Employer's facility was in January, though she acknowledged that Dr. Park returned her to work again in March. She said she did not return because Dr. Park gave her "nothing to work with." She agreed that Dr. Park returned her to work again in April, but said she could not return because she had high blood pressure and had had a seizure. She said she finally retired on August 31, 2004, because she could not wear steel-toed boots and did not want Dr. Park to force her to wear them as required by Employer.

On redirect, Claimant stated she was not present at the meeting on January 28, 2003, between Dr. Freeman and a rehabilitation nurse wherein Dr. Freeman returned Claimant to light duty. She said she learned she was released to work from her attorney and then she went to see Dr. Freeman to verify the return, and that was when Dr. Freeman changed his restrictions.

Medical Evidence

Ingalls Infirmary

The records from Employer's infirmary, located at Employer's Exhibit 13, indicate that Claimant was seen there on June 2, 1998, the day of the accident. It was noted that Claimant stated a large metal structure fell across the bridge of her right foot. Point tenderness was present at the injury site, with a small amout of edema and discoloration. There was no deformity apparent, but Claimant was sent to x-ray. Her foot was wrapped with cast padding and was discharged with post-op shoes and crutches.

T.K. Volkman, M.D.

The records of Dr. Volkman, whom Claimant saw briefly immediately after her accident, are located at Claimant's Exhibit 3 and Employer's Exhibit 14. On June 3, 1998, Dr. Volkman stated that Claimant had a nondisplaced fracture at the base of the great toe metatarsal. He stated he would put her in a cast and see her again in two weeks, however, a note dated the following day indicates that Claimant returned and was "disgruntled" about her working conditions. Dr. Volkman stated he thought Claimant was capable of sedentary work. On June 8, 1998, Claimant returned and was again disgruntled because Dr. Volkman released her to sedentary work. The record states Claimant wanted to see another physician and Dr. Volkman had no objection.

Ben H. Freeman, M.D.

Dr. Freeman assumed Claimant's care. His records are found at Employer's Exhibit 14 and Claimant's Exhibit 3. On June 10, Dr. Freeman noted Claimant's previous diagnosis of a nondisplaced fracture at the base of the great toe metatarsal, and after conducting an x-ray, he thought he also saw a nondisplaced fracture of the second middistal third. He noted that Claimant had been at work and because her foot was in a cast, it had become hot and swollen, so it was removed in the emergency room. Dr. Freeman put Claimant in a soft cast and a Reese shoe and kept her off work with instructions to elevate her foot at all times. He subsequently kept Claimant off work until August 3 because there was still swelling present which needed to be treated with elevation.

Dr. Freeman released Claimant to light work on August 3, 1998 because the swelling in her foot had resolved. On August 31, 1998, Dr. Freeman continued Claimant on light duty for three weeks because of episodic swelling in her foot. On September 22, 1998, Dr. Freeman noted that the x-rays indicated that Claimant's fractures appeared to be well healed, but opined she may have been having arthritic problems in the joint of her big toe. He prescribed anti-inflammatory medicine and continued her on light duty.

On October 13, 1998, Dr. Freeman noted that Claimant's foot was definitely improving and returned her to regular work, stating she could return for a visit in one month if she needed to do so. Claimant did not return until January 5, 2000, where the record indicates she complained of pain in her right foot and left knee. Dr. Freeman stated that x-rays showed mild arthritis in the left knee and moderate arthritis in the midfoot and great toe metatarsophalangeal (MTP) joint, and a little hallux valgus deformity.[6]

On October 18, 2000, Dr. Freeman stated that Claimant was having a lot of discomfort in both knees and both feet, particularly the right foot, because she was on her feet on concrete all day. He noted that an x-ray showed significantly advanced arthritis in the MTP joint and also in the midfoot area. He opined that surgery would not help her much, and all he could do was give her anti-inflammatories and keep her off her feet. On October 25, 2000, Dr. Freeman stated that Claimant had been out of work because Employer did not have light work available. He removed Claimant from work until November 3, 2000.

[6] This is a deviation of the main axis of the tip of the great toe, or main axis of the toe, toward the lateral or outer side of the foot. *Stedman's Concise Medical Dictionary*, 4th ed. (2001).

On March 27, 2001, Claimant presented with a great deal of foot pain. Dr. Freeman stated that after much discussion, it was determined that Claimant desired surgery if it could significantly improve her pain. Dr. Freeman's opinion was that Claimant would need a fusion of the great MTP joint. He doubted any bunion surgery would be helpful, but referred Claimant to Dr. Rutledge for a second opinion and kept Claimant off work. Dr. Rutledge saw Claimant on March 29, 2001, and stated that x-rays showed a large dorsal spur. He opined that most of Claimant's pain occurred with plantar flexion, so in his opinion, a cheilectomy [7] would help, and an MTP fusion was the definitive treatment when Claimant was ready. He gave a slip to Claimant stating she could return to work.

On April 9, 2001, Dr. Freeman discussed performing a cheilectomy with Claimant who indicated she would like to proceed. Dr. Freeman removed Claimant from work on January 8, 2002, and the cheilectomy was scheduled for January 23, 2002. On January 11, the note indicates that Claimant was "wearing steel toed shoes and she cannot work in them." The surgery was performed and both large and small bone spurs were removed. On February 4, 2002, Dr. Freeman noted that the wound looked good and the sutures were removed. On February 18, Claimant was having little pain, and Dr. Freeman ordered physical therapy three times per week for three weeks.

On March 25, 2002, Dr. Freeman noted that Claimant was still having pain and could not wear a steel-toed shoe, which he stated was understandable from looking at her foot. He said that Claimant had enough arthrosis or arthritis of the joint that she was going to have some problems that would not be addressed by the cheilectomy. A note dated April 16, 2002 indicates that Claimant was off work, and Dr. Freeman was made aware of light duty with Employer, but Claimant was unable to work at that time. On the same date, Claimant complained of pain and Dr. Freeman advised her to consider a fusion, which was subsequently performed on May 1, 2002.

Claimant had several follow-up visits after the fusion. On May 29, 2002, it was noted that the plate which was placed in her foot was broken, so Dr. Freeman put her in a cast. Treatment following the fusion consisted mainly of elevation and Claimant wearing a post-op shoe. On July 26, 2002, Claimant reported increased pain in her toe. Dr. Freeman did not observe increased swelling or any problems aside from the broken plate. He decided to wait before considering a refusion.

[7] A chilectomy is the chiseling away of bony irregularities at the osteochondral margin of a joint cavity that interfere with movements of the joint. *Stedman's Concise Medical Disctionary*, 4th ed. (2001).

Claimant was seen by Dr. William A. Crotwell, III for an independent medical examination on September 3, 2002. His records comprise Employer's Exhibit 15. After examining Claimant and reviewing her records and x-rays, Dr. Crotwell opined that Claimant had a serious problem with her foot that had gotten progressively worse. He thought it would be very difficult for her to return to any sort of work activity for any length of time; she would have to have a sedentary job where she could prop her leg up. He opined that Claimant would need another surgery and refusion before she reached MMI and would definitely have a permanent impairment rating.

On September 16, 2002, Claimant returned to Dr. Freeman who noted continued improvement and decided to give Claimant some more healing time. He instructed Claimant to wear tennis shoes in an attempt to get accustomed to wearing shoes with the goal of getting Claimant into steel-toed boots, which Dr. Freeman did not think Claimant was capable of at that time.

On October 14, 2002, Dr. Freeman stated that Claimant had trouble wearing tennis shoes and opined that the plate was putting pressure on her foot. Dr. Freeman reviewed x-rays and opined it would be worthwhile to remove the plate, explore the fusion site, and refuse if necessary. This procedure was performed on November 6, 2002, where the old plate was removed and a new fusion was performed. On November 26, 2002, the note indicates that Claimant's wound was healing with minimal swelling. Despite doing well on December 20, 2002, Claimant reported increased pain and more swelling than usual was noted on January 10, 2003. The x-rays were normal and Dr. Freeman opined that the cold weather was somewhat responsible for Claimant's complaints.

On January 28, 2003, the record indicates that Dr. Freeman had a rehabilitation conference with Regina Etheredge, a rehab counselor who wanted to discuss the possibility of light work. Dr. Freeman stated that he thought it would be reasonable for Claimant to perform light work and imposed restrictions, including limited ladder climbing, and the requirement that Claimant must sit for thirty minutes four times per day, or alternatively, fifteen minutes per hour. With these restrictions, Dr. Freeman indicated that Claimant could return to light duty on January 29, 2003.

The record dated February 3, 2003 indicates that Claimant was "concerned and upset" that she had been released to work. Dr. Freeman stated that it was reasonable for Claimant to perform light work but said that Claimant tried on the

steel-toed shoe at the visit and he could see that wearing it would be very uncomfortable for her. Consequently, Dr. Freeman decided that Claimant was capable of some type of light duty but was not to wear the steel-toed shoes. On February 24, Dr. Freeman noted that he did not feel he had gotten Claimant well enough for her to return to a shipyard wearing steel-toed shoes. He stated that x-rays suggested a fibrous union but wanted a consult with Dr. Park.

William I. Park, IV, M.D.

Dr. Park is an associate of Dr. Freeman's at The Orthopaedic Group to whom Dr. Freeman referred Claimant for a consultation. His records are found at Employer's Exhibit 16 and Claimant's Exhibit 3. Dr. Park initially saw Claimant on February 25, 2003, where he noted Claimant's continued complaints of pain and swelling, and opined they were the result of a fibrous union at the MTP joint. Dr. Park discussed options with Claimant, who expressed her desire to avoid future surgery. Dr. Park recommended that Claimant be fit for a rocker bottom soled, steel shank shoe. He also wanted Claimant to use an EBI pulsed electromagnetic field stimulator to promote bone growth. Dr. Park removed Claimant from work until March 25, 2003.

On March 25, 2003, Dr. Park stated he wanted Claimant to continue using the EBI pulsed stimulator as directed for eight to ten hours per day, and he kept Claimant off work for another month. Claimant returned on April 29, 2003. Dr. Park noted that Claimant had been wearing the steel shank shoe and had been using the bone stimulator. He stated that there was no real swelling present and her wound was well healed. On May 12, 2003, Dr. Park's notes stated that Claimant and her worker's compensation adjuster were supposed to attend a meeting at Dr. Park's office, but the adjuster could not come. Dr. Park acknowledged that Claimant had been off work for quite some time, but insisted Claimant had not yet reached MMI. He said he told Claimant that she could return to work if there was light duty work available where Claimant could have no prolonged standing or walking, could wear her prescribed steel shank shoe and use the bone growth stimulator as prescribed daily. He said Claimant did not think this could be accommodated.

On June 9, 2003, Claimant reported to Dr. Park that with use of the steel shank shoe with the rocker bottoms, her symptoms were "much better." She reported little pain and only intermittent swelling, but noted that pain and swelling increased if she was on her feet for a long time. On July 21, 2003, Dr. Park noted that Claimant continued to have pain, despite the fact that Dr. Park felt that all

conservative treatment had been attempted. He recommended surgery involving removal of hardware and bone grafting.

Claimant had surgery on August 8, 2003. She saw Dr. Park on August 19, where he noted that her wound was healing well and there were no signs of infection. Dr. Park said that Claimant's clinical and radiographical alignment looked excellent. She was placed in a short leg cast. The cast was removed on September 22, 2003, and Dr. Park gave her a sprain walker. On October 21, Dr. Park noted that Claimant was doing well. He said that he told Claimant that it took three months to heal under the best of circumstances.

On November 17, 2003, Dr. Park stated that Claimant had no real physical complaints during her exam. He said she continued to use the stimulator and the walker. Claimant's only complaint on her next visit, December 29, 2003, was that her toe hurt when it was cold outside. Dr. Park recommended at that time that Claimant go back to wearing her steel shank shoe. Dr. Park released Claimant to full duty as of January 8, 2004, with no physical restrictions, but stated that she must wear her steel shank shoes. Claimant returned to Dr. Park on January 30, 2004 and stated that Employer would not let her return to work wearing the steel shank shoes. On that occasion, Dr. Park opined that Claimant did not need to wear the steel shank shoes with a rocker bottom anymore, and he thought she could return to work boots with a steel toe, but thought that a steel shank was still a good idea. He stated he did not see any reason she could not return to her previous occupation, and discharged Claimant from his care.

In a letter to Employer dated February 3, 2004, Dr. Park indicated that Claimant was at MMI on December 29, 2003 and was returned to work with no restrictions. He also assigned a 13 percent permanent partial disability rating to Claimant. On March 16, 2004, Claimant returned to Dr. Park where she complained of occasional pain in her foot. The record indicates that Claimant said there was no way she could return to work, and Dr. Park stated that he saw no reason she could not return to work. He said he considered her at MMI.

Finally, Claimant returned on April 12, 2004, where the record indicates she complained of pain. Dr. Park opined that Claimant was healed and nothing had changed. In his medical opinion, there was no further treatment needed, though Claimant said she felt as though she still needed treatment and wanted to transfer her care to another physician.

Other Evidence

Tommy Sanders, C.R.C.

Mr. Sanders is a certified rehabilitation counselor whose records comprise Employer's Exhibit 18. Mr. Sanders' report states that he conducted a hypothetical vocational assessment and labor market survey regarding Claimant on March 19, 2004. Mr. Sanders stated that in completing the assessment, he considered Claimant's age, education, prior work history, and medical circumstances and limitations. Mr. Sanders reviewed Claimant's medical and personnel records but did not interview Claimant in formulating his assessment.

Mr. Sanders located three full-time potential employment opportunities in the Mobile, Alabama area. The first was a cashier position at Donovan Car Wash which paid $5.15 per hour. This is a light duty position and allows alternate sitting, standing, and walking, and does not require workers to wear steel-toed shoes. Duties include operating the cash register and credit card machine, stocking items such as key chains and deodorizers, and keeping the lobby area clean. One position was available.

Home Depot had two openings for inventory clerks which paid $6.00 per hour. Job duties included changing prices on items and signs, tracking incoming freight, processing special price requests, using electronic gun and lists of items on sale in each department and matching the items, entering the new price, and scanning the bar codes on shelves to activate the price change. Infrequent overhead lifting is involved in this position. The maximum lifting required is ten pounds with occasional pushing and pulling of five pounds, lifting and carrying five pounds. Frequent standing and walking are required with occasional bending, stooping, or squatting.

Shell Convenience Store had two openings for cashiers and paid $5.50 per hour. This position's duties included operating the cash register and credit card machine for gas and store merchandise, activating pumps, stocking coolers and shelves, and balancing the cash drawer at the end of each shift. Lifting and carrying of five to twenty pounds occasionally is involved, as is pushing and pulling five to twenty pounds, overhead lifting of two to five pounds, all on an occasional basis. This position involves occasional sitting with frequent standing and walking, with occasional bending, stooping, or squatting.

Mr. Sanders also retroactively located positions that were available in Claimant's community on December 23, 2003. He determined that Securitas was

hiring security guards on both full and part time bases with wages of $5.25 per hour; Lowe's Hardware had an opening for a cashier at an hourly rate of $5.25, and Control Security Services, Inc. had two full-time security guard positions available which paid $7.25 per hour. Mr. Sanders noted that Claimant should be qualified for the above positions, considering her restriction against wearing steel-toed shoes and the fact that she possessed basic literacy skills.

Employer has submitted various records pertaining to Claimant's employment and injury, including the accident report (EX 1), Employer's first report of injury (EX 2), choice of physician forms (EX 3), Claimant's wage statements which reflect she earned $13.90 per hour in 1997 and $14.17 per hour in 1998 (EX 4), notices of voluntary payment of compensation (EX 5), notices of suspension of payment of compensation (EX 6), employee's claim for compensation form (EX 7), notice of filing of claim (EX 8), notice of controversion (EX 9), and the memorandum of the informal conference (EX 10). This information reflects what is contained in the parties' stipulations.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc*., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides claimant with a presumption that her disabling condition is causally related to her employment if he shows that she suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*,

25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co*., 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.,* 16 BRBS 98 (1984). Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003), *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20(a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on June 2, 1998 during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties stipulation. Claimant injured her right foot while performing the duties required of her as an electrician. The extent, duration and disabling effects of that injury, however, are in issue.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if she has any residual disability after reaching maximum medical improvement (MMI). Id. at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that her condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.,* 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.,* 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.,* 10 BRBS 915 (1979).

In this case, Claimant argues she did not reach MMI until March 16, 2004, while Employer contends that Claimant reached MMI on December 29, 2003. I agree with Employer regarding this issue. Claimant's treating physician at that time was Dr. Park, whom she had seen exclusively since February 2003. Dr. Park saw Claimant regularly and utilized various methods of treating her pain and the underlying condition, ranging from medication to a bone growth stimulator to finally, surgery. In a letter dated February 3, 2004, Dr. Park outlined the treatment he had provided to Claimant and stated: "She was felt to be at maximum medical improvement as of 12/29/03 and was sent back to work with no restrictions. The date of maximum medical improvement would be 12/29/03."

Claimant asserts that she did not reach MMI until March 16, 2004. In the record of the visit she paid to Dr. Park on that date, he stated "at this point I consider her at maximum medical improvement," however, this statement was made in the context of Claimant returning to work, which she claimed she was incapable of and Dr. Park disagreed. Before this visit, Claimant had not seen Dr. Park since January 30, when he opined that there was no reason Claimant could not return to work and discharged her from his care. On December 29, 2003, Dr. Park noted that Claimant had healed well from the surgery and her clinical alignment was "excellent." On January 30, Dr. Park's assessment was that Claimant's condition was solidly healed, and on March 16, 2004, Dr. Park said he had nothing left to offer to Claimant in terms of treatment.

It is apparent that Dr. Park did not initiate new treatment during this time, nor did anything change in Claimant's condition or symptoms between December 29, 2003 and March 14, 2004. Dr. Park was of the opinion that Claimant had reached MMI on December 29, 2003, and there was no future treatment anticipated, nor did Dr. Park state that he expected further improvement in the future. Consequently, because there was no documented difference in Claimant's medical condition between December 29, 2003 and March 16, 2004, and no medical opinion to the contrary, I accept Dr. Park's determination of MMI as December 29, 2003. Any compensation awarded after that date will be permanent in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows she is unable to return to her former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes, 930 F.2d 424, 430* (5th Cir. 1991); *New*

Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981). Furthermore, a claimant who establishes an inability to return to her usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co*., 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20 (a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of her accident.

January 29, 2003-February 5, 2003

Claimant contends that her compensation should not have been terminated during this period because although she was released to light duty with restrictions, Employer did not allow her to work. Employer acknowledged that Claimant was rejected for light duty, but asserts that Claimant could have worked in one of the positions identified in Mr. Sanders' retroactive labor market survey. I disagree.

On January 28, 2003, Dr. Freeman released Claimant to limited duty effective January 29 and imposed the restriction of limited ladder climbing and the requirement that Claimant must be able to sit for thirty minutes four times per day, or alternately, fifteen minutes out of every hour. When Dr. Freeman met with Claimant on February 3, 2003, he concluded that Claimant was capable of some type of light duty but was not capable of wearing steel-toed boots, but the record does not reflect that he modified his prior restrictions.

Because Claimant could not return to her previous employment, Employer must establish the availability of suitable alternative employment. To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within claimant's geographical area which he is capable of performing, considering his age, education, work experience and physical restrictions, for which he is able to compete and could likely secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981).

Turner does not require that the employer find specific jobs for the claimant or act as an employment agency for the claimant; rather, the employer may simply demonstrate the availability of general job openings in certain fields in the surrounding community. *P&M Crane Co. v. Hayes*, 930 F.2d 424, 431 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 1044 (5th Cir. 1992).

However, for the job opportunities to be realistic, the employer must establish the precise nature and terms of job opportunities which it contends constitute suitable alternative employment. *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, 103 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *Turner*, 661 F.2d at 1042-43; *P&M Crane Co.*, 930 F.2d at 430.

The positions identified by Mr. Sanders do not constitute suitable alternative employment during this time period. In the vocational report, Mr. Sanders lists the employer, the name of the position, and the wages, but there is no description of the duties required by the job so that they may be compared with Claimant's physical restrictions. Mr. Sanders stated that Claimant "should" have been able to perform the positions given her only restriction of not wearing steel-toed boots. However, Dr. Freeman placed other restrictions on Claimant, including the ability to sit. Without establishing the terms and nature of the positions Mr. Sanders contends constitute suitable alternative employment, Employer has not borne its burden for the period of January 29, 2003 to February 5, 2003. Accordingly, I find Claimant continued to be totally disabled at that time.

December 29, 2003-March 16, 2004

Though initially Claimant was unable to return to her former employment as an electrician, there is evidence that the permanent impairment of her right foot did not prevent her from returning to her former employment after she had been determined to be at MMI on December 29, 2003. Also, in his vocational report dated March 19, 2004, Mr. Sanders not only identified three potential jobs in Claimant's community which Claimant was capable of performing at that time, but he also retroactively located positions that were available in Claimant's community in December 2003. Therefore, I find that whether or not Claimant could have returned to Employer as of her MMI date of December 29, 2003, Employer has nevertheless met its burden of establishing that alternative employment existed as of that time. The descriptions of those job duties, when compared with Claimant's physical abilities, indicate that Claimant would have been capable of performing such tasks. Therefore, except as to the schedule, I find Claimant is not entitled to any other permanent total disability compensation after her MMI date of December

29, 2003. In other words, because Claimant's is a scheduled injury, she is limited to the permanent partial disability schedule of payment.

If an injury occurs to a body part specified in the statutory schedule, then the injured employee is limited to the permanent partial disability schedule of payment contained in Section 908 (c)(1) through (20). The rule that the scheduled benefits are exclusive in cases where the scheduled injury, limited in effect to the injured part of the body, results in a permanent partial disability was thoroughly discussed by the Supreme Court in *Potomac Electric Power Company v. Director, OWCP*, 449 U.S. 268 (1980) (hereinafter "*PEPCO*").

In this instance, I find, based on Dr. Park's uncontroverted medical opinion contained in the record, that Claimant has shown she has a 13% impairment of the right foot. Section 908(c)(4) of the Act specified under the schedule a maximum of 205 weeks of compensation for a 100% impairment of a foot. Therefore, Claimant's permanent partial award will be 26.65 weeks, based upon the 13% impairment rating provided by Dr. Park.[8]

Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation on June 11, 1998, nine days after injury. Therefore, as Employer paid compensation within 14 days of learning of injury, no § 14(e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer shall pay to Claimant compensation for temporary total disability benefits from January 29, 2003 to February 5, 2003, based on an average weekly wage of $615.49; [9]

[8] Claimant's impairment rating (13%) times the number of scheduled weeks she is entitled to under Section 8(c) (205 weeks) equals 26.65 weeks of compensation.

[9] As previously noted, only two periods of compensation were in issue.

(2) Employer shall pay to Claimant compensation for permanent partial disability benefits in accordance with Section 8(c)(1) of the Act, based on an average weekly wage of $615.49 for a 13% impairment of her right foot, commencing December 29, 2003, for a period of 26.65 weeks;

(3) Employer shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's injuries of June 2, 1998;

(4) Employer shall be entitled to a credit for all payments of compensation previously made to Claimant;

(5) Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(7) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

So ORDERED this 4th day of January, 2005 at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd